LIBRARY
SUPREME COURT, U. S.

Office - Supreme Court, U.S.
FILED
APR 30 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

No. 967

CHARLES NOIA,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MAURICE EDELBAUM,
Counsel for Petitioner.

MAURICE EDELBAUM,
FREDERICK S. ABRAMS,

TABLE OF CONTENTS

	PAGE
The Determinations in the Courts Below	1
Basis of Jurisdiction	4
The Questions Presented for Review	6
Applicable Constitutional Statutory Provisions	6
Argument	6
Appendix	19

CASES

Albright v. New York Life Insurance Co., 261 App. Div. 419	12
Caminito, 222 F. 2d 698	12
Johnson v. Johnson, 277 App. Div. 1143	12
Klein v. Fairberg, 243 App. Div. 609	12
Lyons v. Goldstein, 290 N. Y. 27	7, 9
Monahan v. Kenny, 248 App. Div. 159	12
Morhaus v. Supreme Court, New York County, 293 N. Y. 131	10
People of the State of New York v. Bertram Campbell (not reported)	13
People of the State of New York v. Rizzo, 246 N. Y. 334	8, 9
Tomczak v. Roetzer, 283 App. Div. 851	11
Siegel v. State, 138 Misc. 474	12

STATUTES

New York Civil Practice Act, Sec. 108 .....
New York Penal Law, Sec. 2188 .....
28 U.S.C. Sec. 1257(3) .....
28 U.S.C. Sec. 2101(d) .....
28 U.S.C. Sec. 2101(c) .....

UNITED STATES CONSTITUTION

Fourteenth Amendment, Sec. 1 .....

NEW YORK STATE CONSTITUTION

Article 1, Sec. 6 .....

IN THE

Supreme Court of the United States

October Term, 1957

No.

CHARLES NOIA,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Your petitioner, Charles Noia, respectfully shows the following:

The Determinations in the Courts Below

Petitioner was tried and convicted on March 2, 1942 in the County Court of Kings, State of New York, for the crime of murder in the first degree, and based upon said conviction is presently serving a term of life imprisonment in the Auburn State Prison, Auburn, New York.

Petitioner and co-defendants Santo Caminito and Frank Bonino, were indicted by the Grand Jury of Kings County and charged with the crime of murder in the first degree for the shooting and killing of one Murray Hammeroff (during the commission of a robbery). They were jointly tried and convicted of murder in the first degree in the County Court of Kings County before Hon. Peter J. Brancato and a jury. The jury recommended that they be imprisoned for their respective natural lives, and in conformity with such recommendation, the Court, on March 2, 1942, sentenced all three defendants to natural life in State Prison.

The co-defendants Caminito and Bonino appealed to the Appellate Division, Supreme Court, Second Judicial Department, and the judgment was affirmed by said Court (265 App. Div. 960), and upon appeal to the New York State Court of Appeals, the judgment was again affirmed (291 N. Y. 541). Petitioner failed to appeal.

Co-defendant Caminito thereafter made two motions for reargument, which were denied by the Court of Appeals (297 N. Y. 882; 307 N. Y. 686). The co-defendant Caminito then petitioned the Supreme Court of the United States for certiorari, and his petition was denied with Justices Black and Douglas dissenting (348 U. S. 839). Thereafter the co-defendant Caminito moved by order to show cause for a writ of habeas corpus before the United States District Court for the Northern District of New York (Foley, *J.*) on the ground that confessions introduced at the trial as to each defendant were coerced. Said petition was dismissed with opinion (127 F. Supp. 689).

The said Court thereafter, upon application, granted a Certificate of Probable Cause for Appeal. An appeal was taken to the United States Court of Appeals for the Second Circuit, which unanimously reversed the District Court and sustained a writ of habeas corpus (22 F. 2d 698). The Supreme Court of the United States denied the District Attorney's application for Certiorari (350 U. S. 896).

Thereafter, the defendant Bonino moved in the Court of Appeals for reargument of the judgment of affirmance, and said motion was granted on January 5, 1956 (309 N. Y. 950). On April 27, 1956, upon said reargument, the Court reversed the judgment of conviction and ordered a new trial, with the following memorandum:

> "Since the United States Court of Appeals, Second Circuit, has held that the writ of habeas corpus must issue to his co-defendant, Caminito because his confession was inadmissible, the defendant Bonino should, in the interests of justice, receive a new trial with his (Bonino's) confessions excluded" (1 N. Y. 2d 752).

The order affecting petitioner Noia is dated June 25, 1956 and vacates the judgment of conviction rendered against him on March 12, 1942 wherein he was sentenced to natural life upon his conviction for the crime of murder in the first degree. Said order directed that he be returned from Auburn State Prison to the custody of the Commissioner of Correction of the City of New York to await a new trial. Thereafter a motion was made for bail and petitioner was admitted in $25,000. bail. The District Attorney appealed from said order to the Appellate Division of the

Supreme Court of the State of New York, Second Judicial Department, and on the 17th day of June, 1957 said order was unanimously reversed. Hon. Stanley F. Fuld, Associate Judge of the Court of Appeals of the State of New York, on June 24, 1957, granted a Certificate certifying that there is a question of law involved which ought to be reviewed by the Court of Appeals. Said Judge also granted a Certificate of Reasonable Doubt, and continued the petitioner in bail in the sum of $25,000., the amount which Hon. George J. Joyce, County Judge, had fixed at the time he vacated and set aside the judgment of conviction on June 25, 1957. On January 23, 1958, the Court of Appeals of the State of New York rendered a decision unanimously affirming the order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, which order reversed the order made by Hon. George J. Joyce, County Judge of Kings County, dated June 26, 1956. A copy of the opinion of the Court of Appeals of the State of New York is attached hereto and made a part hereof (See Appendix).

Basis of Jurisdiction

(i) Petitioner seeks a review of a final order of the Court of Appeals of the State of New York, rendered January 23, 1958, which order was filed in the office of the Clerk of said Court on the same day, affirming an order of the Appellate Division, Second Judicial Department, which reversed an order made by Hon. George J. Joyce, County Judge of Kings County, dated June 26, 1956, which order vacated a judgment of the County Court of Kings County, dated March 2, 1942, convicting petitioner of the crime of murder in the first degree and sentencing him to life imprisonment pursuant to the jury's recommendation.

On February 11, 1958, petitioner made application to the Hon. Stanley H. Fuld, Associate Judge of the Court of Appeals of the State of New York, for an order staying all proceedings in the above entitled matter, pending an application for certiorari by this Court. On February 11, 1958, the Hon. Stanley H. Fuld granted petitioner's application only to the extent of ordering that all proceedings on the part of the District Attorney of Kings County be stayed for a period of thirty days from February 11, 1958, and that the bail theretofore fixed in the sum of $25,000. be continued for the aforesaid thirty day period, to enable petitioner to make application to a Justice of this Court for a further stay and for a continuance of bail after the thirty day period.

Application for said stay and bail, pending determination of this petition for writ of certiorari was made to Mr. Justice Harlan, Associate Justice of this Court, who on March 6, 1958, denied the relief sought. Thereupon, and on or about March 21, 1958, petitioner surrendered to the Department of Correction of the City of New York and was returned to Auburn State Prison, Auburn, New York, where he is presently serving his term.

(ii) This Court has jurisdiction of this petition for certiorari under Sections 1257(3) and 2101(c and d), Title 28, United States Code, the petition being one to review a final judgment of a State Court of last resort.

(iii) The Court of Appeals of the State of New York has decided Federal questions of substance in a manner not in accordance with applicable decisions of this Court.

The Questions Presented for Review

(1) Whether or not the Courts of the State of New York have the inherent power to vacate a judgment of conviction where due process has been violated in obtaining said judgment.

(2) Where a defendant in a criminal case fails to appeal and it is subsequently determined in a judicial proceeding concerning co-defendants in the exact same status as defendant that due process was violated in obtaining the judgment, whether or not the failure of a State to provide a remedy to rectify such wrong violates due process.

Applicable Constitutional Statutory Provisions

(A) Constitution of the United States, Section 1 of the Fourteenth Amendment:

> "* * * nor shall any State deprive any person of life, liberty or property, without due process of law; * * *"

(B) Constitution of the State of New York, Article 1, Section 6:

> "* * * No person shall be deprived of life, liberty or property without due process of law."

ARGUMENT

The appellant Noia did not appeal from his judgment of conviction. It is unnecessary to argue the reasons as to why the appellant did not appeal because whatever the reasons, they are not pertinent to the issue at bar.

The learned District Attorney contends that the Court below was without power to vacate and set aside its judgment by reason of Section 2188 of the Penal Law, which reads in part as follows:

> "provided, however, that the imprisonment directed by the judgment shall not be suspended or interrupted after such imprisonment shall have commenced."

Prior to the case of *Lyons* v. *Goldstein*, 290 N. Y. 27, it was the opinion of some judges that they had no power to correct a judgment once the defendant had commenced to serve his sentence and the time to appeal had expired, because of the foregoing limitation of Section 2188.

In *Lyons* v. *Goldstein*, however, the Court stated, referring to the said section:

> "If the order of Special Term were to be sustained upon a construction of the foregoing statutes in a manner contrary to what we have found to be their proper constructions, the statutes would be repugnant to the due process clauses of the Constitutions of the United States and the State of New York. United States Amendment 14, New York Article 1, Section 6. * * * The inherent power of a court to set aside this judgment which was procured by fraud and misrepresentation cannot be doubted. * * *. The power was exercised in criminal cases at common law through the writ of error coram nobis * * *. No statute has been called to our attention, nor have we been able to find another where a competent court has been denied jurisdiction to reopen its judgment where the same was based upon trickery, deceit, coercion or fraud and misrepresentation in the procurement of the plea upon which

> the judgment was based. * * * The record herein disclosed that Bendix, or some one in his behalf has made a number of applications during the past four years for executive clemency. On two occasions the District Attorney of the County of New York joined in the application and one of the applications was initiated by the judge who pronounced sentence. In spite of all that all applications have been denied. The inadequacy of such a remedy, if it were a remedy is clearly demonstrated by the record in this case. Nevertheless, executive clemency presents no such relief as Bendix desires and as he is entitled to receive, if he can, upon a hearing, establish grounds for the invalidity and nullity of the judgment of conviction. Executive clemency does not eliminate the fact of conviction; it merely results in ending further punishment."

In the Court below the respondents based their appeal as to Noia mainly on the case of *People of the State of New York* v. *Rizzo*, 246 N. Y. 334. Said case, decided on November 22, 1927, was an appeal from a judgment of conviction taken by one of four defendants convicted of an attempt to commit robbery in the first degree. There the Court, in reversing the judgment of conviction as to one of the four defendants, states in *dicta* as follows:

> "A very strange situation has arisen in this case. I called attention to the four defendants who were convicted of this crime of an attempt to commit robbery in the first degree. They were all tried together upon the same evidence, and jointly convicted, and all sentenced to state's prison for varying terms. Rizzo was the only one of the four to appeal to the Appellate Division and to this court. His conviction was affirmed by the Appellate Division by a

> divided court, two of the justices dissenting, and we have now held that he was not guilty of the crime charged. If he were not guilty, neither were the other three. As the others, however, did not appeal, there is no remedy for them through the courts; their judgments stand, and they must serve their sentences."

However, the Court, realizing the injustice of the situation, then went on to further state:

> "This, of course, is a situation which must in all fairness be met in some way. Two of these men were guilty of the crime of carrying weapons, pistols, contrary to law, for which they could be convicted. Two of them, John Thomasello and Thomas Milo had also been previously convicted, which may have had something to do with their neglect to appeal. *However, the law would fail in its function and its purpose if it permitted these three men whoever or whatever they are to serve a sentence for a crime which the courts subsequently found and declared had not been committed.* We therefore suggest to the district attorney of Bronx County that he bring the cases of these three men to the attention of the Governor, to be dealt with as to him seems proper in the light of this opinion."

Thus, as far back as November 1927, the Court of Appeals realized in the *Rizzo* case the injustice of such a situation, as the *dicta* of the court indicates. We have therefore, in 1927, in the *Rizzo* case, the beginning of the doctrine which was later enunciated in *Lyons* v. *Goldstein*, *supra*, decided March 4, 1943.

Since the case of *Lyons* v. *Goldstein*, *supra*, there appears a definite trend by the Courts of New York to rectify in-

justice whenever possible. Thus we have the case of *Morhaus* v. *Supreme Court, New York County*, 293 N. Y. 131, where the inherent power of a criminal court to vacate a judgment of conviction because of failure to comply with due process of law, was again enunciated:

> "The Court of General Sessions had, it is undisputed, jurisdiction of the person of the petitioner and jurisdiction of the offense with which he was charged. It was therefore a competent court to try the charge and to sentence the defendant if convicted. Imprisonment under a judgment rendered by a court which had jurisdiction to try the charge is not unlawful if measured solely by common-law rules and standards. 'An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not nullity, if the court has general jurisdiction of the subject, although it should be erroneous.' Ex parte Tobas Watkins, 3 Pet. 193, 203, 7 L. Ed. 650. Doubtless that common-law principle does not apply in full force where a court of competent jurisdiction has failed in the course of a trial to observe the requirements of due process. In such case imprisonment, though under a judgment of a court which has general jurisdiction of the subject, is unlawful, and the person imprisoned is deprived of his liberty by the State without due process if he cannot find a remedy in an appropriate proceeding in a court of competent jurisdiction."
>
> * * * * *
>
> "In the Matter of Lyons v. Goldstein, supra, that question was authoritatively decided by a closely divided court. We held that a court of criminal jurisdiction has inherent power to set aside upon motion its own judgment based upon fraud or mis-

> representation of an officer of the State depriving a defendant of due process even though no such power is expressly conferred by the Code of Criminal Procedure, and that limitations contained in the Code, relating to other motions affecting a judgment, do not apply in such case. Cf. Robinson v. Johnson, supra. It is hardly open to question that in accordance with the principles formulated in the opinion in Matter of Lyons v. Goldstein, supra, and authoritatively established by the decision in that case, a motion by the relator in the Court of General Sessions to vacate the judgment of conviction of that court would be an appropriate proceeding in which remedy for the alleged wrong could be obtained upon proof of the truth of the allegations of the petition."

It must be conceded that if it is to be held that the appellant has no remedy at law and that his only remedy is with the Governor, the appellant will have suffered an injustice.

The Supreme Court of the State of New York, in *civil cases* has consistently held that it had the inherent power to vacate and set aside its judgments in furtherance of the ends of justice independently of the Civil Practice Act. In the case of *Tomczak* v. *Roetzer*, 283 App. Div. 851, the Court stated:

> "We do not agree with the Special Term that the Supreme Court is without jurisdiction to entertain appellant's motion to set aside the order of March 5, 1952 dismissing the complaint for failure to prosecute. The inherent power of the Supreme Court to set aside or vacate judgments in furtherance of the ends of justice is unquestioned and exists independently of Section 108, Civil Practice Act."

Section 108 of the Civil Practice Act reads as follows:

> "The court in its discretion, and upon such terms as justice requires, at any time within one year after notice thereof, may relieve a party from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect."

The foregoing section seems to have a similar limitation to that of Section 2188 of the Penal Law, yet, in civil cases, the law is unquestioned that the Court has inherent power to act in furtherance of justice.

Albright v. *New York Life Insurance Co.*, 261 App. Div. 419;
Monahan v. *Kenny*, 248 App. Div. 159;
Klein v. *Fairberg*, 243 App. Div. 609;
Johnson v. *Johnson*, 277 App. Div. 1143;
Siegel v. *State*, 138 Misc. 474.

Is it to be said that courts may rectify an injustice in civil cases more readily than courts may do so in criminal cases, where life and liberty are involved?

That fraud and misrepresentations were employed here to secure the alleged confession, which is the only substantial evidence in this case, has been authoritatively established by the United States Circuit Court's findings in ruling on the *Caminito* writ of habeas corpus, 222 F. 2d 698. It has been determined by a Federal Court that the means by which the confessions used at the trial in this case were obtained, were repugnant to the due process clause of the United States Constitution.

As to the Court's inherent power to rectify its own judgment, after such judgment was determined to have

been erroneous, even though the defendant has not availed himself of the right to appeal the judgment, we may look to the case of *People of the State of New York* v. *Bertram Campbell* (not reported), in which Judge Mullen, of the Court of General Sessions, held that the Court had the inherent power to do so. This decision of the Court of General Sessions has not been challenged. The opinion of Judge Mullen in said case reads in part as follows:

> "Apparently the Goldstein case was the first occasion in the history of this state, up until 2 years ago, for our Court of Appeals to be called upon to make that decision. The Court there held that there is nothing unique about a Judge in a criminal case which excepts it from the rules applicable to judgments generally and the inherent powers of the courts with reference to them, and decided that this court has inherent power to set aside, upon motion, its judgment based upon fraud and misrepresentation on the part of an official of the state depriving a defendant of due process of law, even though no such power is expressly conferred by the Code of Criminal Procedure. The Court of Appeals in the Goldstein case further decided that the limitations contained in the Code relating to other matters affecting a judgment do not apply in such case.
>
> "Now, you, Mr. Knapp, who represents the District Attorney seems to interpret that case as a decision by the court applying only to cases in which that power exists where fraud and misrepresentation have been done. I do not believe that the Court of Appeals intended to limit the inherent power of this court over its judgment to cases involving fraud or misrepresentation on the part of an officer of the state depriving a defendant of due process of law. I believe the Court of Appeals merely de-

termined that in a case of that nature this court has inherent power over its judgments, but the Court of Appeals did not by any means, as I read the case, decide that this court had not the same inherent power over its judgment in certain other cases.

"The Court of Appeals did not say what other cases it might apply to, but it certainly did not say that it could not apply to any other type of case even though in the Gersewitz case it said it may not. We know the Court of Appeals in those cases had before it only the facts in the case upon which it was passing. * * *

"The District Attorney agrees that the defendant is not guilty of the crime for which he was convicted. Yet, as long as this judgment stands, the defendant Campbell remains branded as a convict. The stigma still attaches to him. The Governor's pardon has not removed it. He is still subject to certain legal burdens as a result of that conviction. If he were unfortunate enough to be convicted in the future in this case of a felony he would be liable to a mandatory sentence in state prison. * * * As far as I can find, and as far as anybody has been able to demonstrate to me if the defendant's application is denied on this motion, there are no means available to him to obtain the relief to which he is obviously entitled. I believe this court has the power to grant the relief herein prayed for.

"Motion granted and judgment of conviction is vacated and set aside and indictment dismissed."

Respondents argue that because Noia failed to avail himself of his right to appeal he has no recourse but to remain in jail to serve a life sentence based on a judgment

which has concededly been declared a nullity by the Federal Court due to the invalidity of a confession. To do this would leave this defendant sitting out a life-sentence on a state of facts and law which it is conceded are identical with those of his co-defendants, Caminito and Bonino, on a conviction that our highest courts have held in the Caminito and Bonino cases to be an unlawful one and in violation of due process.

The County Court opinion states the case aptly, as follows:

> "That Noia, no less than Caminito and Bonino, was deprived of his constitutional right to due process of law at his trial, is apparent from all the facts presented, as well as from the ruling of the higher courts which granted relief to his two co-defendants.
>
> "This court is convinced that it would be a travesty on justice to withhold from petitioner the relief he seeks in view of the tainted antecedents of the conviction entered against him. To withhold the relief because of a procedural technicality would compound the injustice. On any conception of constitutional law, it would be unthinkable to condemn petitioner to serve out a life sentence on a palpably illegal conviction by foreclosing the only available avenue of judicial review" (373, 374).

The learned Assistant District Attorney indicates that the appellant Noia's only remedy is an application to the Governor. We respectfully point out to the Court that an executive pardon in this case would not grant the appellant the relief to which he is entitled, as the conviction would always be a stigma on his record which the

executive pardon could not eradicate, as he would be subjected to legal burdens as a result of that conviction. If he were unfortunate enough to be convicted of a felony again in this state, despite such pardon, if and when granted, he would be regarded as a second felony offender. Whether the application made in the Court below is labelled as *coram nobis* or as a motion addressed to the inherent power of the Court is immaterial. Justice should not depend upon mere labels or procedural technicalities.

Developments in the highest courts of this state, and decisions of the Federal Court with respect to due process demand that elemental justice not be denied a defendant merely because of his omission to take certain procedural steps.

The County Court has in such cases the inherent power to vacate a judgment of conviction where the constitutional requirements of due process have been violated.

It is petitioner's contention that the failure of a state to afford him a remedy under the circumstances as hereinabove outlined is a violation of due process under the Constitution of the United States; that where it has been determined in a judicial proceeding that due process was violated in obtaining a judgment of conviction against said co-defendants, who stand in the exact same status as the petitioner, that the failure of the State of New York to provide him a remedy merely for failure to comply with a technical requirement is a violation of due process as to him, in derogation of his rights under the Constitution.

Recent decisions of the Court of Appeals of the State of New York have indicated that each case should be judged upon its own merits. It seems to counsel that this is one

case which should be placed in such category, and that justice requires that the order of the Court of Appeals affirming the order of the Appellate Division should be reversed and the order of the County Court should be affirmed.

WHEREFORE, petitioner Charles Noia respectfully prays that a writ of certiorari may issue out of and under the seal of this Court, directed to the Court of Appeals of the State of New York, commanding the said Court to certify and send to this Court for review and determination, as provided by law this cause and a complete transcript of the record and proceedings had herein, to the end that the order of the Court of Appeals of the State of New York, affirming an order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, which reversed an order of the County Court of Kings County, which order vacated a judgment of the County Court of Kings County, dated March 2, 1942, convicting petitioner of the crime of murder in the first degree and sentencing him to life imprisonment, may be reversed, and that the petitioner may have such other and further relief as to this Court may seem just and proper.

Dated: New York, N. Y.
April 18, 1958

MAURICE EDELBAUM,
Counsel for Petitioner.

MAURICE EDELBAUM,
FREDERICK S. ABRAMS,
Of Counsel.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

I hereby certify that I have examined the foregoing petition for a writ of certiorari and that in my opinion it is well founded and the cause is one in which the petition should be granted.

.....
MAURICE EDELBAUM
Counsel for Petitioner

Sworn to before me this
18 day of April, 1958.

FREDERICK S. ABRAMS
NOTARY PUBLIC, State of New York
No. 24-5006950
Qualified in Kings County
Commission Expires March 30, 1960

APPENDIX

STATE OF NEW YORK

COURT OF APPEALS

No. 280

THE PEOPLE &c.,

Respondent,

vs.

SANTO CAMINITO,

Appellant.

THE PEOPLE &c.,

Respondent,

vs.

CHARLES NOIA,

Appellant.

OPINION

FULD *J.*:

Concerned though we are with appeals in two separate cases, one involving Santo Caminito, the other, Charles Noia, we treat them together since they stem from the same prosecution and involve facts common to both.

Caminito, Noia and Frank Bonino were indicted in 1942 for the murder of one Hameroff. At the trial, the only evidence of guilt consisted of confessions signed by each defendant in which he acknowledged participation in an

attempted robbery of Hameroff terminating in his fatal shooting. Concluding that the confessions were not coerced, as the defendants contended, and that their contents were true, the jury found the three defendants guilty of felony murder and the trial judge, upon the jury's recommendation, sentenced each to life imprisonment. Only Caminito and Bonino appealed and their judgments of conviction were affirmed (265 App. Div. 960; 291 N. Y. 541, rearg. den. 297 N. Y. 822; cert. den. (as to Bonino) 333 U. S. 849, (as to Caminito) 348 U. S. 839). Some years later, Caminito sought redress in the federal courts by way of habeas corpus; the United States Court of Appeals for the Second Circuit, reversing the District Court, sustained the writ on the ground that it appeared, upon the facts "not disputed," that Caminito's confessions had been coerced. (See *United States ex rel. Caminito* v. *Murphy*, 222 F. 2d 698, 699-700, revg. 127 F. Supp. 689, cert. den. 350 U. S. 896). Following this determination, Caminito was remanded (by order of the District Court) to the Kings County Court "for such other and further proceedings as justice may require upon the indictment against him * * * for the crime of murder in the first degree" and, some short time later, Caminito, urging that the evidence before the grand jury was insufficient, moved to set aside the indictment. The County Court granted the motion, but the Appellate Division reversed.

The fact that a judgment of conviction has been reversed and a new trial ordered does not mean that there *must* be a new trial. The defendant possesses a right to challenge the indictment because of an asserted lack of

evidence before the grand jury even after reversal and the grant of a new trial. (See, e.g., *People* v. *Mullens*, 298 N. Y. 606; *People* v. *Nitzberg*, 289 N. Y. 523, 530-531). Such a reversal does not, however, give the defendant any greater right than that which he had before the first trial. In other words, he may have the indictment set aside only if on its face the record before the grand jury reveals that the evidence did not spell out a *prima facie* case of guilt. (See, e.g., *People* v. *Donahue*, 309 N. Y. 6, 7; *People* v. *Sweeney*, 213 N. Y. 37, 44, 45-46.) As we recently wrote in the *Donahue* case (*supra*, 309 N. Y. 6, 7), any defense which a defendant may have, any taint that a defendant may be able to show with respect to evidence adduced, not apparent in the grand jury minutes, "must be offered at the trial for the appraisal and decision of the (trial) jury. A court has no alternative but to deny a motion to set aside an indictment on the ground that there was insufficient evidence before the grand jury, when that body has acted upon evidence sufficient, 'if unexplained or uncontradicted' (Code Crim. Pro., Sec. 258 (renumbered Sec. 251)), to warrant a conviction by the trial jury."

In the case before us, the evidence presented to the grand jury—testimony of confessions by the defendant and proof of the *corpus delicti*—was unquestionably sufficient to warrant a conviction of murder in the first degree by the trial jury. That being so, the indictment is immune from attack on a motion such as here made, and the Appellate Division correctly decided that Caminito's application should be denied.

That, of course, disposes of Caminito's appeal, but we add this further word in view of the district attorney's

contention that the People are privileged to introduce his confessions into evidence upon a retrial. In sustaining Caminito's writ of habeas corpus, the United States Court of Appeals held the confessions coerced on the basis of facts "not disputed" (222 F. 2d 698, 699-700). It is virtually impossible to perceive how, upon a new trial, evidence could justify their admission. Accordingly, when on reargument granted to Bonino, this court, solely on the strength of the federal court's determination as to Caminito, reversed Bonino's conviction and directed that there be a new trial, we explicitly declared that the new trial was to proceed "with his (Bonino's) confessions excluded" (1 N. Y. 2d 752, 753). The same, of course, applies to Caminito's.

With regard to the appeal taken by Noia, to which we now turn, the Appellate Division reversed the order of the Kings County Court vacating and setting aside the judgment of conviction against him.

As noted above, Noia did not appeal from the judgment of conviction, as had Caminito and Bonino, nor did he seek, as had Caminito, relief by way of habeas corpus in the federal courts. In fact, it was not until June of 1956, after this court had reversed the judgment against Bonino and after the Kings County Court had dismissed the indictment against Caminito, that Noia made the motion resulting in the order now before us. He maintains that he stands in the same position as Caminito and Bonino and that, despite his acceptance of the conviction and his failure to appeal from the judgment, the trial court has "inherent power" to set aside its own judgment procured in violation of constitutional right.

Appendix

Not having participated in the appeals prosecuted by his co-defendants, Noia is not entitled to the beneficial results that they obtained. Some years ago, we held that the nonappealing co-defendants of one whose conviction was reversed on appeal have "no remedy * * * through the court"; the judgments recorded against them "stand" and "they must serve their sentences." (*People* v. *Rizzo*, 246 N. Y. 334, 339.) Their only recourse, the court observed, was to the Governor for executive clemency.

Nor does the revitalization of *coram nobis* in this state since 1943 (see *Matter of Lyons* v. *Goldstein*, 290 N. Y. 19) change that and afford Noia a remedy in the courts. We have already adverted to the fact that at the trial the defendant claimed that his confessions were procured through coercive methods. The court left that question to the jury and, when its finding proved adverse to his contention and a judgment of conviction was rendered against him, Noia could have had the issue reviewed and considered, as did his co-defendants, on appeal and in the subsequent proceedings. His failure to pursue the usual and accepted appellate procedure to gain a review of the conviction does not entitle him later to utilize the present day counterpart of the extraordinary writ of error *coram nobis*. (See, e.g., *People* v. *Sullivan*, 3 N. Y. 2d 196, 198.) And this is so even though the asserted error or irregularity relates to a violation of constitutional right. (See *Davis* v. *United States*, 121 F. 2d 594, 596, cert. den. 353 U. S. 960; *Howell* v. *United States*, 172 F. 2d 213, 215, cert. den. 337 U. S. 906.) While the scope of *coram nobis* has been somewhat expanded beyond its original office (see, e.g., *People* v. *Shaw*, 1 N. Y. 2d 30; *People* v. *Kronick*, 308 N. Y. 866),

it still remains an emergency measure employed for the purpose for which it was initially designed, of calling up facts unknown at the time of the judgment. The present, quite obviously is not such a case.

The order of the Appellate Division should be affirmed in each case.

FROESSEL, *J.*:

I agree for affirmances in both cases. I do not agree, however, that we have the right to say, as to Caminito's confessions, that it is "virtually impossible to perceive how, upon a new trial, evidence could justify their admission". If substantially the same evidence surrounding the confessions is adduced on a retrial, those confessions must of course be excluded (see *People* v. *Bonino*, 1 N. Y. 2d 752). If, however, upon another trial, it can be demonstrated by new or additional evidence that the confessions were not coerced, or that a question of fact as to coercion is reasonably and fairly presented, the People may not be precluded from reoffering them.

* * * * *

In *People, &c.*, v. *Caminito*: Order affirmed. Opinion by Fuld, *J.* All concur except Froessel, *J.*, who concurs in result only in a separate opinion in which Dye and Burke, *JJ.*, concur.

In *People, &c.*, v. *Noia*: Order affirmed. Opinion by Fuld, *J.* All concur.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 27 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

No. 967

CHARLES NOIA,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDWARD S. SILVER
District Attorney, Kings County
Attorney for Respondent

WILLIAM I. SIEGEL
Assistant District Attorney
of Counsel

INDEX

	PAGE
Statement	1
Record Facts	2
Questions Presented	4
Jurisdiction	5
Argument	6
Conclusion	15
The Petition Should Be Denied	15

Cases Cited

Dixon v. Duffy, 344 U. S. 143, 97 L. Ed. 153, 73 S. Ct. 193	12
Durley v. Mayo, 351 U. S. 277, 100 L. Ed. 1178, 76 S. Ct. 806	12
Edelbaum v. California, 344 U. S. 358, 97 L. Ed. 387, 73 S. Ct. 293	12, 14
Hedgebeth v. North Carolina, 334 U. S. 806	11
Howell v. United States, 172 F. 2d 213, cert. den. 337 U. S. 906	12
Loftus v. Illinois, 334 U. S. 804, 92 L. Ed. 1737, 68 S. Ct. 1212	6, 11
Mooney v. Holahan, 294 U. S. 103, 79 L. Ed. 791	6
People v. Rizzo, 246 N. Y. 334	13
Phyle v. Duffy, 334 U. S. 431, 92 L. Ed. 1494, 68 S. Ct. 1131, re-hearing den. 334 U. S. 862, 92 L. Ed. 1782, 68 S. Ct. 1526	11, 15

PAGE

Stembridge v. Georgia, 343 U. S. 541, 96 L. Ed. 1130, 72 S. Ct. 834 12

Woods v. Nierstheimer, 328 U. S. 210, 90 L. Ed. 1177, 66 S. Ct. 996 11

Young v. Ragen, 337 U. S. 235, 93 L. Ed. 1333 6

OTHER CITATIONS

Title 28, U. S. Code, Sections 1257 (3) and 2101 (c and d) 5

Code of Criminal Procedure, Section 517 ..... 6, 8

Code of Criminal Procedure, Section 519 7

Code of Criminal Procedure, Section 520 ..... 7, 8

Code of Criminal Procedure, Section 521 8

CONSTITUTIONAL PROVISIONS

U. S. Constitution, Fourteenth Amendment, Section 1 5

New York State Constitution, Article 1, Section 6 .. 5

IN THE

Supreme Court of the United States

October Term, 1957

No.

CHARLES NOIA,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

Petitioner seeks review of a final order of the Court of Appeals of the State of New York, rendered January 23, 1958, affirming an order of the Appellate Division, Second Judicial Department, which reversed an order made by the Hon. George J. Joyce, a County Judge of Kings County, on June 26, 1956. This order vacated a judgment of the County Court of Kings County dated March 2, 1942, which convicted petitioner of the crime of Murder in the First Degree and, pursuant to the jury's recommendation, sentenced him to life imprisonment.

Petitioner applied to the Hon. Stanley H. Fuld, Associate Judge of the Court of Appeals, for an order staying

all proceedings pending an application for certiorari to this Court. Judge Fuld on February 11, 1958, granted the application only to the point of ordering that for a period of thirty days from that day all proceedings on the part of the District Attorney of Kings County be stayed. The purpose of such stay was to prevent petitioner's imprisonment under the original judgment of conviction. The order fixed bail in the sum of $25,000, to enable petitioner to make application to a Justice of this Court for a further stay and for bail during the period of such stay, if granted.

The Hon. John M. Harlan, Associate Justice of this Court, on March 6, 1958, denied petitioner's application for the further stay and bail. Petitioner thereupon surrendered himself to the Department of Correction of the City of New York on or about March 21, 1958 and was recommitted to Auburn State Prison, Auburn, New York, where he is presently incarcerated.

Record Facts Material to the Questions Presented

Petitioner, Santo Caminito, and Frank Bonino were indicted by the Grand Jury of Kings County and charged with the crime of Murder in the First Degree for the shooting and killing of Murray Hammeroff during the commission of a robbery. They were jointly tried and convicted of that crime. On March 2, 1942, the Court, in conformity with a recommendation by the jury, sentenced all defendants to terms of imprisonment for their respective natural lives.

Petitioner Noia did not appeal from the judgment.

Caminito and Bonino did so appeal and the judgment was affirmed by the Appellate Division (265 App. Div. 960) and by the Court of Appeals (291 N. Y. 541).

Caminito thereafter made two motions for re-argument, which were denied by the Court of Appeals (297 N. Y. 882; 307 N. Y. 686).

The Supreme Court of the United States denied his petition for certiorari (Black and Douglas, *JJ.* dissenting) (348 U. S. 839). A petition for a writ of habeas corpus was dismissed by the United States District Court for the Northern District of New York (127 F. Supp. 689), which however, granted a certificate of probable cause for appeal. The United States Court of Appeals for the Second Circuit reversed the order of the District Court (222 F. 2d 698), whereupon the District Court made an order granting the writ and directing that Caminito be transferred by the Warden of Auburn Prison to the custody of the Commissioner of Correction of the City of New York "for such other and further proceedings as justice may require upon the indictment now pending against him in the County Court of Kings County for the crime of Murder in the First Degree". Caminito was subsequently admitted to bail on June 7, 1955 by the Hon. George J. Joyce, a County Judge of Kings County, and has since been at liberty.

After the Supreme Court of the United States denied the People's petition for certiorari to United States Court of Appeals, Joyce *J.* dismissed the indictment against him by an order of June 12, 1956 (19-24). This was one of the

orders reversed by the Appellate Division (4 App. Div. 2d 697). The order in effect reinstated the indictment.*

Despite the fact that petitioner Noia did not appeal from the judgment of conviction and did not, either with appellant Caminito or independently, initiate any proceedings in the Federal Courts addressed to the judgment of conviction, Joyce, *J.*, vacated the judgment of conviction as to him by the order of June 26, 1956 (25-30). This order was also reversed by the Appellate Division and the judgment was in effect reinstated. It is from the order of the Court of Appeals, affirming the order of the Appellate Division, that certiorari is sought.

Questions Presented

Petitioner contends:

(1) The Courts of the State of New York have inherent power outside the scope of, and in addition to, the writ of error coram nobis to vacate a judgment of conviction where due process has been violated in obtaining the judgment.

(2) A determination in a judicial proceeding, *concerning co-defendants*, that due process was violated in obtaining judgments of conviction against them inures to the benefit of petitioner; and the failure of the State to provide a means whereby he may avail himself of the determination of lack of due process with respect to his co-defendants itself violated due process with respect to him.

---

* To complete this historical statement, it should be noted that the Court of Appeals (1 N. Y. 2d 752) granted Bonino's motion for re-argument of his appeal from the original judgment of conviction and directed a new trial upon the indictment. He too, like Caminito, is now at liberty under bail of $25,000.

It is claimed that the Fourteenth Amendment, Section 1 of the Constitution of the United States is applicable to these contentions. It is also claimed (we submit, obviously without merit in the assertion of a violation of Federal Constitutional rights) that the Constitution of the State of New York, Article 1, Section 6 is applicable to these contentions.

Basis of Jurisdiction

It is contended that this Court has jurisdiction of the petition for certiorari under Title 28, United States Code, Sections 1257(3) and 2101 (c and d), since the petition is one to review a final judgment of a State Court of last resort.

It is further contended that jurisdiction lies to entertain the petition because "the Court of Appeals of the State of New York has decided Federal questions of substance in a manner not in accordance with applicable decisions of this Court."

We are confident of our ability to demonstrate that jurisdiction is totally lacking because:

(1) The New York Court of Appeals decided the question before it upon an adequate basis of State law, and

(2) No Federal question was involved in the proceedings before the Court of Appeals of the State of New York and no Federal question is presented to this Court.

ARGUMENT

I.

The requirements of due process lay upon the States the obligation to provide a method of post-trial judicial review of judgments of conviction which deprive a person of his liberty without due process of law in violation of the Constitution of the United States. *Mooney* v. *Holahan*, 294 U. S. 103, 79 L. Ed. 791. But the choice of *method* for review lies within the power and prerogative of the States, the requirements of due process being satisfied if *any* adequate method of review is supplied by the States. *Mooney* v. *Holahan*, *supra*; *Loftus* v. *Illinois*, 334 U. S. 804, 92 L. Ed. 1737, 68 S. Ct. 1212; *Young* v. *Ragen*, 337 U. S. 235, 93 L. Ed. 1333. With respect to petitioner's contention of lack of due process in his conviction: *i.e.*, that it had been procured solely by the use of a coerced confession, the State of New York did provide for him such protection by way of an appeal from the judgment.

New York Code of Criminal Procedure, Section 517, provides:

> "§517. In what cases appeal may be taken by defendant.
>
> An appeal may be taken by the defendant as of right from a judgment on a conviction in a criminal action or proceeding as follows:
>
> 1. Where the judgment is of death, directly to the Court of Appeals.
>
> 2. Where the judgment is other than of death, in the City of New York, (a) to the appellate division

of the supreme court of the department in which the conviction was had, from a conviction by the supreme court or by the court of general sessions of the county of New York or a county court, or from a conviction by a court of special sessions; • • •;

3. • • •."

Section 519 of the Code of Criminal Procedure provides:

"§519. Appeal to court of appeals from intermediate appellate court.

Upon the determination of an appeal, other than from a judgment of death, taken as provided in section five hundred seventeen or five hundred eighteen, an appeal may be taken from such determination by any party aggrieved to the court of appeals in the following cases, provided such party obtains a certificate granting permission to appeal, as provided in section five hundred twenty:

1. From a judgment or order affirming or reversing a judgment of conviction, including an order granting a new trial,

2. • • •

3. • • •

4. • • •

5. • • •

6. • • •."

Code of Criminal Procedure, Section 520, provides:

"§520. Certificate required for appeal to court of appeals.

1. Where an appeal has been taken and has been decided by any appellate tribunal referred to in sec-

> tion five hundred seventeen, a further appeal to the court of appeals shall lie as hereinafter prescribed, but not otherwise. If a judge of the court of appeals or a justice of the appellate division of the supreme court of the department in which such conviction was had makes a certificate granting permission to appeal and certifying that a question of law is involved which ought to be reviewed by the court of appeals, then a further appeal on such question of law may be taken to the court of appeals.
>
> 2. * * *."

Code of Criminal Procedure, Section 521, provides:

> "§521. Appeal to be taken; when.
> An appeal from a judgment or order pursuant to section five hundred seventeen or five hundred eighteen must be taken within thirty days after the judgment was rendered or service of a copy of the order with notice of entry thereof, except that when a party takes an appeal to the court of appeals after obtaining a certificate pursuant to section five hundred twenty, such appeal shall be timely if the application for leave to appeal is made within such thirty days and if the notice of appeal is duly served and filed within fifteen days after the certificate is granted."

By the enactment of Code Crim. Pro. §517, the Legislature of the State of New York gave petitioner an *automatic* right of appeal to the Appellate Division, of which he could not be deprived save by his own laches in failing to observe the time limitations imposed by Section 521 of the Code. The further right of appeal to the Court of Appeals, although conditioned upon the granting of the permission provided for by §520, must be viewed as an additional right

of appeal which the Court of Appeals would not deny to an applicant rightfully entitled to present an arguable question of law to that Court. Absent such appeal, the judgment of conviction is a conclusive determination of guilt, properly and legally established.

Basic in the consideration of the problem raised by the instant petition is the fact that petitioner, of his own volition, did not avail himself of these rights of appeal from the original judgment of conviction.

No explanation is offered to this Court, and none has been offered to any of the State Courts, for petitioner's non-employment of these rights of appeal which have been so signally useful and valuable to his original co-defendants. It is, indeed, entirely within the realm of probability that his inaction was a tacit admission of guilt and an expression of satisfaction with his escape from the extreme penalty of death.

Instead, he sought to substitute a method of procedure which he conceived,—erroneously, as the event showed,—to fit the requirements of his case. The Court of Appeals determined, however, that within the laws of the State of New York, he had by his inaction forfeited the right to review the legality of his conviction and could not substitute therefor a remedy from within whose scope his case was excluded by State law. This is made patent and obvious by that portion of the opinion, per Fuld, *J.*, which dealt with his contentions:

> "With regard to the appeal taken by Noia, to which we now turn, the Appellate Division reversed the order of the Kings County Court vacating and setting aside the judgment of conviction against him.

As noted above, Noia did not appeal from the judgment of conviction, as had Caminito and Bonino, nor did he seek, as had Caminito, relief by way of habeas corpus in the federal courts. In fact, it was not until June of 1956, after this court had reversed the judgment against Bonino and after the Kings County Court had dismissed the indictment against Caminito, that Noia made the motion resulting in the order now before us. He maintains that he stands in the same position as Caminito and Bonino and that, despite his acceptance of the conviction and his failure to appeal from the judgment, the trial court has 'inherent power' to set aside its own judgment procured in violation of constitutional right.

Not having participated in the appeals prosecuted by his co-defendants, Noia is not entitled to the beneficial results that they obtained. Some years ago, we held that the nonappealing co-defendants of one whose conviction was reversed on appeal have 'no remedy * * * through the court'; the judgments recorded against them 'stand' and 'they must serve their sentences.' (People v. Rizzo, 246 N. Y. 334, 339). Their only recourse, the court observed, was to the Governor for executive clemency.

Nor does the revitalization of coram nobis in this state since 1943 (see Matter of Lyons v. Goldstein, 290 N. Y. 19) change that and afford Noia a remedy in the courts. We have already adverted to the fact that at the trial the defendant claimed that his confessions were procured through coercive methods. The court left that question to the jury and, when its finding proved adverse to his contention and a judgment of conviction was rendered against him, Noia could have had the issue reviewed and considered, as did his co-defendants, on appeal and in the subsequent proceedings. His failure to pursue the

usual and accepted appellate procedure to gain a review of the conviction does not entitle him later to utilize the present day counterpart of the extraordinary writ of error coram nobis. (See, e. g. People v. Sullivan, 3 N. Y. 2d 196, 198) And this is so even though the asserted error or irregularity relates to a violation of constitutional right. (See Davis v. United States, 121 F 2d 594, 596, cert. den. 353 U. S. 960; Howell v. United States, 172 F 2d 213, 215, cert. den. 337 U. S. 906). While the scope of coram nobis has been somewhat expanded beyond its original office (see, e. g., People v. Shaw, 1 N. Y. 2d 30; People v. Kronick, 308 N. Y. 866), it still remains an emergency measure employed for the purpose for which it was initially designed, of calling up facts unknown at the time of the judgment. The present, quite obviously, is not such a case."

In this posture of the case, we respectfully submit, this Court is now called upon to apply the rule from which it has never departed: that where the judgment or order of a State Court rests upon an adequate non-federal ground, this Court will not assume jurisdiction to review the action of the State Court. *Woods* v. *Nierstheimer*, 328 U. S. 210, 90 L. Ed. 1177, 66 S. Ct. 996; *Phyle* v. *Duffy*, 334 U. S. 431, 92 L. Ed. 1494, 68 S. Ct. 1131, re-hearing denied 334 U. S. 862, 92 L. Ed. 1782, 68 S. Ct. 1526; *Loftus* v. *Illinois*, *supra*.

So strong is the rule that it has been enforced even in cases where the opinion of the State Court and the record in the case leaves doubt whether or not it decided the matter upon an adequate state ground. *Hedgebeth* v. *North Carolina*, 334 U. S. 806, 92 L. Ed. 1739, 68 S. Ct. 1185. The rule is applied even in cases where, the highest Court of the State having delivered no opinion, it appears that

nevertheless its judgment *might* have rested upon a non-federal ground. *Stembridge* v. *Georgia*, 343 U. S. 541, 96 L. Ed. 1130, 72 S. Ct. 834; *Edelman* v. *California*, 344 U. S. 358, 97 L. Ed. 387, 73 S. Ct. 293; *Dixon* v. *Duffy*, 344 U. S. 143, 97 L. Ed. 153, 73 S. Ct. 193; *Durley* v. *Mayo*, 351 U. S. 277, 100 L. Ed. 1178, 76 S. Ct. 806.

In *Edelman* v. *California*, *supra*, the Court wrote:

> "It is clear that this Court is without power to decide whether constitutional rights have been violated when the Federal questions are not seasonably raised in accordance with the requirements of State law (citing cases). *Non-compliance with such local law can thus be an adequate State ground for a decision below.* * * *
>
> The denial of petitioner's motion, therefore, rested on an adequate State ground, *his choice of the wrong remedy under local law.* (citing cases.)" (Italics ours).

Here, as in *Edelman* petitioner is debarred from the relief he seeks by his own "choice of the wrong remedy under local law."

The requirements of accurate procedure are no less definite with respect to prosecutions in the Federal Court and efforts made there to escape the consequences of conviction. In *Howell* v. *United States*, 172 F. 2d 213, cert. den. 337 U. S. 906, the United States Court of Appeals for the Fourth Circuit, per Parker, *J.* wrote:

> "Furthermore, all of appellant's complaints relate to matters which, if based upon fact, should have been called to the attention of the Court at the trial and made the subject of timely appeal from the judg-

ment, not raised by habeas corpus or by a motion questioning collaterally the validity of the proceedings leading to conviction. It is elementary that neither habeas corpus nor motion in the nature of application for writ of error coram nobis can be availed of in lieu of writ of error or appeal, to correct errors committed in the course of a trial *even though such errors relate to constitutional rights.*" (Italics ours).

The petition stresses the claimed injustice of compelling Noia to remain imprisoned, despite the fact that his co-defendants Caminito and Bonino have thus far been relieved of the judgments against them. It does not add to the cogency of the argument that petitioner is pictured as "sitting out a life sentence". Whatever be the consequences of his inaction during the period in which Caminito and Bonino strove so fully in their own behalf, that inaction was dictated by his own choice and for his own reasons and motives. True it is, that the aim of the law is justice; but it is equally true that the law, for wise reasons of its own, dictates the means and methods of attaining justice. That the Court of Appeals of the State of New York is concerned with the discovery and application of justice need not be argued as a question for its high aims are demonstrated in its recorded decisions. Yet that Court specifically rejected the argument of injustice as not applicable to petitioner's case. At the same time it pointed out to him, as it had done in *People* v. *Rizzo*, 246 N. Y. 334, an avenue of relief (see opinion of Fuld, *J.*, Appendix to to Petition, p. 23).

In *Rizzo*, four defendants were jointly indicted, jointly convicted and jointly sentenced for the crime of Attempted

Robbery in the First Degree. Rizzo alone appealed and in the Court of Appeals the judgment of conviction was reversed and a new trial ordered. The Court wrote:

> "If he (Rizzo) were not guilty, neither were the other three. *As the others, however, did not appeal, there is no remedy for them through the court; their judgments stand, and they must serve their sentences.* This of course is a situation which must in all fairness be met in some way. Two of these men were guilty of the crime of carrying weapons, pistols, contrary to law, for which they could be convicted. Two of them, John Thomasello and Thomas Milo, had also been previously convicted, which may have had something to do with their neglect to appeal.* However, the law would fail in its function and its purpose if it permitted these three men whoever or whatever they are to serve a sentence for a crime which the courts subsequently found and declared had not been committed. We, therefore, suggest to the district attorney of Bronx County that he bring the cases of these three men to the attention of the Governor to be dealt with as to him seems proper in the light of this opinion." (Italics ours.)

We do not deem it to be of service to the Court to answer or analyze the cases which petitioner so profusely cites. They are obviously inapposite to the sole point of inquiry before the Court and equally obviously unavailing to petitioner in light of the repeated decisions of this Court which may be summarized in the relevant words of *Edelbaum* v. *California, supra*:

> "The denial of petitioner's motion, therefore, rested on an adequate State ground, his choice of the wrong remedy under local law."

In Conclusion

We respectfully submit:

Petitioner had available, but failed to avail himself of, that post-trial remedy by appeal for the alleged infractions of his Constitutional rights which due process requires. His failure to proceed in accordance with State law constitutes a proper ground for refusal of relief by the State Court. That Court's order, therefore, rested upon an adequate State ground and left "no Federal Constitutional question presented which is ripe for decision here." *Phyle* v. *Duffy, supra.*

II.

The petition should be denied.

Dated: Brooklyn, New York,
May 1958.

Respectfully submitted,

EDWARD S. SILVER
District Attorney, Kings County
Attorney for Respondent

WILLIAM I. SIEGEL
Assistant District Attorney
of Counsel